Supreme Court, U.S.
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No. 93-1054

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., MANFACTURAS DE MODAS LTDA., INCOLCO LTDA., VALERY FASHIONS LTDA., CREACIONES KAREN LTDA., TOTE EXPORT MANUFACTURAS LTDA., and CREACCIONES IVONNE LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

In the civil forfeiture context:

1. Whether the warrants for arrest of article-in-rem which sought to search for and seize "all wire transfers to the Republic of Colombia" for a two month period were (i) so overbroad as to be general warrants and (ii) being extra-judicial and not based upon probable cause, require, under the Fourth Amendment, the sanction of suppression of evidence?

2. Whether the requirements of procedural due process preclude a District Court from ordering forfeiture of money alleged to be the "proceeds" of narcotics trafficking when the District Court relied upon a Magistrate Judge's

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[1] For reasons of economy, the claimants herein adopt the petitions of their co-claimants in this action filed with this Court rather than raising the same issues for review.

determination that the money was so forfeitable which determination was based solely upon evidence submitted by the United States to the Magistrate Judge ex parte and in camera?

3. Whether the requirements of substantive due process preclude a District Court from ordering forfeiture of the claimants' money absent evidence which connects the specific money as the "proceeds" of narcotics trafficking?

LIST OF PARTIES AND RULE 29.1 LIST

The parties, grouped by their respective counsel, to the proceeding sought to be reviewed are (i) the petitioners, Confecciones Zuny LTDA., Manfacturas de Modas LTDA., Incolco LTDA., Valery Fashions LTDA., Creaciones Karen, LTDA., Tote Export Manufacturas LTDA., and Creacciones Ivonne LTDA., who, though technically not corporations under United States jurisprudence, have no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1, (ii) Manufacturas Intenacionales Ltda., Abuchaibe Hnos. Ltda, Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda., and (iii) the

United States of America. In addition to these parties, in the District Court, Siracusa Trading Co. and the Heirs of Heriberto Castro-Mesa were also claimants but chose not to seek an appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Confecciones Zuny LTDA. ("Zuny"), Manfacturas de Modas LTDA. ("Modas"), Incolco LTDA. ("Incolco"), Valery Fashions LTDA. ("Valery"), Creaciones Karen, LTDA. ("Karen"), Tote Export Manufacturas LTDA. ("Tote"), and Creacciones Ivonne LTDA. ("Ivonne" and collectively "the Barranquilla Claimants") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in that proceeding on September 10, 1993.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York is reprinted in the

appendix hereto, page A-i, infra. The opinion of the Court of Appeals for the Second Circuit is reported at ____ F.3d ____, and is reprinted in the appendix hereto, page A-75, infra.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 10, 1993. The Court of Appeals denied a timely filed petition for rehearing on October 6, 1993, which is reprinted in the appendix hereto, starting at page A-167, infra. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis for federal jurisdiction in the United States District Court for the Eastern District of New York was 28 U.S.C. §1345 and §1355.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The United States Constitution provisions involved are the Fourth Amendment and the Fifth Amendment. The statutory provisions involved are 21 U.S.C. §881, 18 U.S.C. §981 and 19 U.S.C. §1615. These provisions are set out in pertinent part in the appendix hereto starting at page A-171, infra.

STATEMENT OF THE CASE

A. **Background** - The Barranquilla Claimants are clothing manufacturers and exporters located in the Republic of Colombia. As a result of the stimulus of Colombian export incentive law which sought to attract U.S. dollars, the Barranquilla Claimants' clothing exports were financed in U.S. dollars from 1988 through 1991 with loans arranged by independent currency exchanges located in Colombia. Eleven of these loans, which were wire

transfers going to Colombia through intermediate banks located in New York, were seized by the United States in July and August 1990 and represent the defendant funds claimed by the Barranquilla Claimants in this action.

B. **Seizure of the Funds** - This civil forfeiture case was commenced on July 16, 1990, by the filing of a verified complaint-in-rem in the Eastern District of New York and the issuance of a warrant for arrest of article-in-rem by the clerk of that court for funds being transferred through Merrill Lynch Bank, Columbus, Ohio. This initial filing made no reference to any New York bank, the Barranquilla Claimants or to any funds belonging to them.

On July 16 and 17, 1990, both the amended and second amended verified complaints-in-rem were filed and supplemental warrants for arrest of article-in-rem issued by

the clerk. Neither the original nor the two supplemental warrants contained any information regarding any New York bank or the Barranquilla Claimants.

On July 18, 1990, at an unknown time of day, the United States filed its third amended complaint-in-rem and the clerk issued its related supplemental warrant for arrest of article-in-rem. This warrant for the first time contained, among others, the name of a New York branch of Banco Atlantico and four of the Barranquilla Claimants: Modas, Incolco, Karen and Tote. Additionally on that date, and presumably before the above third amended complaint-in-rem was filed, transfers of $400,000 to Modas, $200,000 to Incolco and three transfers totaling $354,100 to Karen were seized by the United States at Banco Atlantico.

On July 19, 1990, the United States filed its fourth

amended complaint-in-rem and the clerk issued its related supplemental warrant for arrest of article-in rem. This warrant added no new Barranquilla Claimants or banks relevant to this petition. Nonetheless, on this date transfers of $800,000 to Incolco and $448,418 to Valery were seized at Banco Atlantico.

On July 20, 1990, the fifth amended complaint-in-rem was filed and another related supplemental warrant for arrest of article-in-rem issued by the clerk. Relevant to this petition, this warrant added only the Barranquilla Claimant Valery whose funds had been seized the day before. Also on this date, transfers of $400,000 to Zuny (not yet named in any complaint), $401,500 to Karen and $392,860 to Tote were seized at Banco Atlantico.

On July 24, 1990, the sixth amended complaint-in-

rem was filed and related supplemental warrant for arrest of article-in-rem was issued. This warrant for the first time adds Barranquilla Claimant Zuny. Additionally, transfers of $26,000 and $12,000 to Zuny were seized.

Based upon the extremely limited in scope original warrant for arrest of article-in-rem, the United States commenced on July 16, 1990, a general search of **all** electronic wire transfers of funds to Colombia (and a seizure of some $12 million) through certain New York banks over a period of two months. To wit:

On August 3, 1990, Banco Atlantico wrote the United States Attorney's office confirming that:

> Pursuant to your instructions, since July 17, 1990, Banco Atlantico has informed your office of **all transactions** which order that funds be transferred through Banco Atlantico to **any** banks in Colombia including, but not limited to Banco de Caldas and Banco del

> Estado. You have advised us that bank-to-bank transfers which do not involve any of the Claimants named in the Warrant may however, be effected without consulting with your office, If, however, the transfer order includes a named beneficiary (**even if the beneficiary is not one of the identified Claimants**) Banco Atlantico must request instructions from your office **prior** to effecting the transfer. (emphasis added).

Confirming this remarkable practice of searching and seizing all wire transfers to Colombia based on the naked oral authority of an assistant United States Attorney, on August 8, 1990, the United States Attorney's office wrote the banks involved stating, "any monies wire transferred to your institution for the ultimate benefit of entities . . . who are not listed . . . on the enclosed [seventh amended] warrant should now be paid without first consulting with this office." (emphasis added) Last, On August 23, 1990, counsel for Banco Atlantico confirmed that the search and seizure of

transfers not listed on the warrant was done "upon the express verbal instruction of the United State Attorney's office. . .". (emphasis added)

Regarding the seizures of the funds, a representative of Banco Atlantico testified at his deposition:

> Well, if [the wire transfer] was not on the [warrant for arrest of article-in-rem] we also received instructions to double check with the U.S. Attorney whether or not we could process with the payment or hold the money. . . . We got instructions to **fax them over every transaction** that we got for third-party beneficiaries in Colombia. . . . What we would do is fax a copy of the transaction to [the assistant U.S. Attorney] and then he would, same day or the next day the latest, tell us over the phone, "Okay, you are supposed to freeze this transaction as well." And then usually the **same day or the day after** we would get the legal document with those instructions. (emphasis added)[2]

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[2] As the above chronology unequivocally demonstrates, two transfers to various Barranquilla Claimants were seized prior to the filing of any complaint-

On February 11, 1992, the Barranquilla Claimants moved to suppress the evidence based upon the circumstances surrounding the seizures. On March 3, 1992, the District Court heard oral argument and denied the motion. Nonetheless, the District Court invited the Barranquilla Claimants to take the matter to the Second Circuit noting that, ". . . I do think that the Fourth Amendment is being badly battered by what happens here."

C. **Ex Parte, In Camera Forfeiture Order** - The District Court referred to Chief United States Magistrate Judge A. Simon Chrein the question of probable cause for the forfeiture of the defendant funds and ordered the United States to hold a hearing within sixty days

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in-rem naming these claimants, seven transfers were seized on, curiously, the same day that amended complaints-in-rem were filed and three seizures occurred after complaints had been filed.

thereafter at which time "the claimant is entitled to know what the evidence is and to meet it." The Magistrate Judge was to make a determination if the "ex parte, in camera showing by the Government, was sufficient to demonstrate good cause" for the forfeiture. These rulings were codified in the District Court's order of April 12, 1991.

Thereafter, the Magistrate Judge held an ex parte, in camera hearing on April 29, 1991, involving only the assistant United States Attorneys assigned to the case. The transcript of that hearing has been, and continues to be, sealed. Based upon the evidence submitted at that hearing, the nature of which the Barranquilla Claimants to this day do not know, the Magistrate Judge entered his order of May 13, 1991, finding probable cause to "believe that the defendant funds constitute the proceeds of narcotics

trafficking and/or money laundering activities and are therefore subject to forfeiture".

On May 28, May 29 and June 7, 1991, the District Court conducted a public evidentiary hearing to determine if probable cause existed for the forfeiture of the funds seized. At that hearing, the United States called five witnesses and introduced numerous exhibits.

On two separate occasions at the conclusion of the this hearing, the District Court stated that the United States had failed to make a "public" showing of probable cause. First, the Court noted "[c]ertainly [the United States] haven't shown [probable cause to forfeit] in public. Whether they've shown it in private, I can't say. They may have shown it in private. They haven't shown it in public." (emphasis added).

Second, in colloquy with counsel regarding the

showing of probable cause to forfeit the Court confirmed that a showing had not been made "in public." (emphasis added). At the conclusion of the hearing the District Court stated, "I'll decide on what I have, what the magistrate has because he has, looked at all of [the ex parte, in camera submissions].

Notwithstanding the District Court's repeated expression of a lack of "public" showing to support a finding of probable cause to forfeit, the Court "rule[s] immediately that given the circumstances [the United States] ha[s] sufficiently established probable cause. . .".

After the conclusion of the hearing, the District Court entered its order finding, with a minor exception, that "probable cause exists to believe that all of the defendant funds which were seized by the United States in this action

and which are the subject of verified claims filed by all of the claimants herein are subject to forfeiture. . .".

D. **The Public Evidence Forfeiture Order** - A review of the facts presented by the United States at the public three day probable cause hearing demonstrates that the United States presented no facts to establish that the Barranquilla Claimants' money was the proceeds of narcotics trafficking. Simply stated, as the United States knew nothing about the source from which the money came, how could they present proof that the money was the "proceeds" of narcotics trafficking?

The funds of the Barranquilla Claimants which were seized by and which were ordered forfeited to the United States in this action are as follows:

1. Confecciones Zuny LTDA - a transfer from Jose Garviria in the amount of $400,000.

2. Manufacturas De Modas LTDA - a transfer from Trend Precious Metals of $400,000.

3. Incolco LTDA - a transfer from Trend Precious Metals of $800,000 and from International Exchange & Investments of $200,000.

4. Valery Fashions LTDA - a transfer from Trend Precious Metals of $448,418.

5. Creaciones Karen LTDA - a transfer from Jose Garviria of $401,500, a transfer from D'Group of $54,100, a transfer from El Banquito Latino of $100,000 and a transfer from International Exchange & Investments of $200,000.

6. Tote Export LTDA - a transfer from Universal Cambios of $392,860.

7. Creaciones Ivonne LTDA - a transfer from Edgar Castro of $32,000.

For the transfers from Jose Garviria, Universal Cambios, D'Group, Edgar Castro and Trend Precious Metals to the Barranquilla Claimants, the United States'

lack of evidence connecting these funds with narcotics trafficking means that there was no proof that these funds were the proceeds of anything, let alone narcotics trafficking.

For the transfer from El Banquito Latino, the only evidence adduced at that hearing was testimony that:

> El Banquito Latino is listed in DEA records as a company involved in money laundering, also known as Telefax, located in Texas, has been utilized in the past by the Medellin Cartel as a communication center and, also utilized as a money laundering (sic) for both Cali and Medellin Cartels. That the DEA suspected El Banquito Latino was involved in money-laundering.

Last, as for transfers from International Exchange & Investments, the only evidence presented to the District Court was that a bank had filed a criminal referral form as a result of large transfers in and out of the account and that

the account from which the funds had been transferred have been forfeited subsequent to the transfers seized in this matter.

E. **Trial** - Following a jury trial, the verdict forfeited the bulk of the seized funds to the United States and returned a small part to three of the claimants. Final judgment with memorandum was entered on August 5, 1992 with a technical amendment filed on September 14, 1992.

REASONS FOR GRANTING THE WRIT

Given this Court's "sparse caselaw on the subject of in rem forfeiture . . ." Austin v. United States, 61 LW 4811, 4817 (1993) (Scalia, J., concurring), this case presents, in the Second Circuit or anywhere, one of the first civil forfeiture cases which has run the full course from seizure through jury trial and appellate review. Hence, the procedural and substantive issues decided by the Second Circuit in this case will stand as law unless reviewed. Given the almost boundless power of the United States to seize and forfeit property in derogation of the Constitution as displayed in this matter, such review is of extreme public importance.

I.

The conflict between the Fourth Amendment's "particularity clause" and the scope and practical use of the extra-judicial warrant for arrest of article-in-

rem raises important and unresolved Fourth Amendment problems.

The warrants for arrest of article-in-rem were both "general warrants" and not judicially issued and as such all evidence obtained by them should be suppressed.

A. **General Warrants** - In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied, 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed.2d 72, 107 S.Ct. 1013 (1987), this Court held that, "[t]he manifest purpose of this particularly requirement was to prevent general searches". Id. at 480 U.S. 84.

In this case, the warrants for arrest of article-in-rem were utilized by the United States to commence a general "rummaging" through the affairs of those who happened to be transferring funds by wire to the Republic of Colombia in July and August 1990. The testimony and correspondence of the bank officials quoted above unequivocally confirms that they were instructed by assistant United States Attorneys to perform a general search of all wire transfers to Colombia, regardless of source or beneficiary.

A review of the various complaints-in-rem reveal the progression of the addition of various claimants to those complaints. What patently happened here was (i) once advised by the bank that a transfer of funds to Colombia had been seized by the bank pursuant to the United States'

oral instructions, (ii) the United States added the name of the beneficiary of the seized funds to the complaint-in-rem, (iii) filed the amended complaint-in-rem with the clerk and (iv) had a new warrant issued by the clerk to retroactively seize the already seized funds.[3]

This neat trick made a complete end run of the

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[3] As the verbal evidence concerning the existence of the wire transfers gained from the banks was used to "validate" the subsequent warrant for arrest of article-in-rem, such a seizure violated the "probable cause" requirement of the Fourth Amendment and therefor the evidence obtained therefrom should be suppressed. This Court in Smith v. Ohio, 494 U.S. 541, 543 (1990), recognized that "justifying the arrest by the search and at the same time . . . the search by the arrest just will not do. . . it is axiomatic that an incident search may not precede an arrest and serve as part of its justification." (Citations omitted). Here, the Government obtained the names of and details concerning the wire transfers to the Barranquilla Claimants from Banco Atlantico, then had issued, based upon this information, supplemental warrants for arrest of article-in-rem to seize the already seized transfers. Otherwise, the names of the Barranquilla Claimants would have appeared upon the complaints-in-rem prior to the seizures.

Fourth Amendment. A similar practice was the basis for the holding in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) that the New York State wiretapping statute violated the Fourth Amendment as it was overbroad. In Berger, this Court stated:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations. . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without

> adequate judicial supervision or protective procedures.

Id. at 388 U.S. 59-60.

Each of the abuses of the New York wiretapping statute which lead to it being declared unconstitutional were employed against the Barranquilla Claimants in the execution of the warrants for arrest of article-in-rem.

The funds seized were not "particularly" described until after their seizure -- thus giving the United States a "roving commission" to search and seize at will. Moreover, the search went on at several banks during the months of July and August 1990. There was no termination for the searching of the wire transfers except in the sole discretion of the United States. Last, there was no return and thus "full discretion" was left in the United States. As such, in practice the use of the warrants for arrest of article-in-rem

effected a "blanket grant of permission" to the United States to "rummage" around without "judicial supervision".

This practice cannot be countenanced by allowing the Second Circuit's approval of the United States' actions to stand without further scrutiny.

B. **Non-Judicially Issued Warrants** - The expansion of the scope of the Fourth Amendment's privacy protections must now encompass wire transfers. The threshold determination of any Fourth Amendment claim is "whether the defendant has established a legitimate expectation of privacy in the area searched." United States v. Chuang, 897 F.2d 646, 649 (2nd Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 77. Here, that "legitimate expectation" regarding the privacy of the wire transfers is grounded upon "a subjective expectation of privacy . . . that

society accepts as objectively reasonable." California v. Greenwood, 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). That expectation regarding the privacy of wire transfers emanates from the necessary expansion of privacy rights based upon the realities of modern day life and the reaction to those realities by the Federal Courts and Congress.[4]

Hence, this Court has appropriately evolved the scope of the Fourth Amendment privacy rights to keep pace

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[4] Congress' opinion on the scope of the Fourth Amendment has been expressed recently in the Right to Financial Privacy Act, at 12 U.S.C. §3401 et seq. and the Electronic Communications Privacy Act at 18 U.S.C. §2510 et seq. These acts, individually and collectively, bestow upon the Barranquilla Claimants the "legitimate expectation" that their wire transfers will be secure from any seizure absent judicially authorized legal process. This Court should give consideration and deference to these deliberate expressions of congress in making the same determination.

with the march of technology. In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), this Court ruled that wiretapping of telephone lines did not violate the Fourth Amendment as there was no trespass by act of wiretapping. However, almost forty years later this Court reversed itself in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967), by extending the Fourth Amendment's expectation of privacy realm to include telephone conversation upon a recognition that:

> The underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

Id. at 389 U.S. 353. This same erosion of the "trespass" doctrine now forces re-examination of the scope of the Fourth Amendment in light of the rapid expansion of communication technology.

Thus, just as congress in passing the Electronic Communications Act recognized that "the law must advance with the technology to ensure the continued vitality of the Fourth Amendment", 1986 U.S. Code. Leg. & Ad. News at 3559, so too must the courts continue to breath life into that Amendment. Accordingly, the electronic communications which were the seized wire transfers must be given the same protections that would attach if the very same communication had been uttered orally or mailed.

Long ago, in Ex Parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877, 879 (1878), this Court recognized that:

> Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

The wire transfers seized here are no different, save for the intervention of technology's effects, than those sealed letters in Ex Parte Jackson. That intervention which precludes the sealing of the communication in an envelope allows the intermediary bank to know the contents of the wire transfer. This lack of ability to seal the transfers is a function of the technology of electronic communication and not a function of the diminished expectation of privacy that the sender, and society, places on banking transactions.

Accordingly, just as the petitioner in Katz relied

upon the privacy of the telephone wire for his oral communications, the Barranquilla Claimants "justifiably relied" on the privacy of the banking wire transfer for their electronic communications in conducting their business and as such enjoy the same protections of the Fourth Amendment's judicially authorized warrant requirement. Id. at 96 U.S. 733.

II.

The ability of the United States to forfeit property based upon evidence submitted ex parte and in camera raises important and unresolved Fifth Amendment problems.

On June 13, 1991, the District Court entered its order finding probable cause to forfeit each of the Barranquilla Claimants' funds. Given the repeated assertions by the District Court quoted above that the United States failed to

make a "public" showing for such a forfeiture, the June 13, 1991, order necessary relied on information not presented at the "public" probable cause hearing. Ergo, the District Court based its order of June 13, 1991, in whole or in part, upon the Magistrate Judge's ex parte, in camera finding of probable cause.

The inability of the Barranquilla Claimants to meet and challenge such a finding is conceptually incompatible with our system of justice.

"The fundamental requisite of due process of law is the opportunity to be heard". Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 1369, 34 S.Ct. 779 (1914). Moreover, "[i]t goes without saying that the requirement of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." Federal Trade

Commission v. National Lead Company, 352 U.S. 419, 427, 1 L.Ed. 2d 438, 444, 77 S.Ct. 502 (1957).

It states the obvious to say that an ex parte hearing is not adversarial as the claimants have no idea what evidence is being produced against them. The reliance upon in camera evidence by the District Court in its finding of probable cause to forfeit the funds seized denied to the Barranquilla Claimants the "adversarial" essence of a hearing as they could neither test the sufficiency of this evidence nor introduce evidence to rebut it. See: Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129, 1133 (1937) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."); Gonzales v. United States, 348 U.S. 407, 414, 75

S.Ct. 409, 99 L.Ed. 467, 472 (1954) ("Petitioner was entitled to know of the Department [of Justice]'s recommendation so he could muster his facts and argument to meet its contentions"). Bowman Trans. v. Arkansas-Best Freight, 419 U.S. 281, 288, n.4, 42 L.Ed.2d 447, 457, 95 S.Ct. 438 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.")

Again, the Second Circuit completely fails to address this issue. While recognizing that the ex parte, in camera hearing occurred, A-90, infra, they failed to mentioned it further.

In essence, and simply unbelievable in the United States in the 20th century, the Barranquilla Claimants had their property taken from them without ever learning the reasons for such action by the United States. If due process truly insures an opportunity to be heard in a "meaningful manner", the Barranquilla Claimants must be given that opportunity -- they weren't.

III.

Regardless of the standard of evidence to justify forfeiture employed, the result of forfeiture based upon the quality of evidence in this matter is unfair and raises important and unresolved Fifth Amendment problems.

The Second Circuit was clearly troubled by the present state of forfeiture law noting:

> The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil

> forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress. (A-149, infra, emphasis added)

As detailed above, this "balance"[5] has resulted in a

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[5] In its opinion, the Second Circuit noted that they had articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993), they required that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled substance'", in United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 403 (2nd Cir. 1992), cert. denied, 61 U.S.L.W. 3772 (1993), the standard "need not be a substantial connection between the drug activities and the property in question, but only a nexus

forfeiture order in this matter when the "res" simply was not "connected" by the facts in the public hearing to any narcotics trafficking.[6]

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between them." A-77, infra. The Second Circuit resolved the conflict by adopting the "nexus between the seized property and illegal drug activity" standard. A-78, infra.

[6] As in the wire transfer context the only mediate facts about the "res" are its source, amount and destination, only the first mentioned can relate to whether or not the funds are the "proceeds" of narcotic activity. Hence, the only other information that could have served as a basis for forfeiture of the funds was that their destination -- to the Barranquilla Claimants -- somehow established they were the "proceeds" of narcotics activity.

Given that "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner", United States v. Brig Malek Adhel, 2 How. 210, 233 (1844), a priori, such "destination" evidence can never serve as a basis for a forfeiture in an in rem proceeding as the "res" could not be "guilty" of anything prior to its arrival at the alleged illegal situs.

This tactic of establishing probable cause to forfeit by

"So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty'". United States v. Salerno, 481 U.S. 739, 746, 95 L.Ed.2d 697, 708, 107 S.Ct. 2095 (1987) (citations omitted). In this matter, the United States' ability to seize and forfeit the "res" without connection of the "res" to narcotics trafficking simply "shocks the conscience" -- such a practice implicitly means that there are no logical limits to forfeiture anymore. Truly, the United States can

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demonstrating that the recipient, and not the funds seized, is tainted stands the entire in rem proceeding on its head. In essence, the government is prosecuting an in personam case against the recipient based upon a belief that the recipient is involved in money laundering activities under the guise of an in rem cause. In this light, the seizure of the funds was in reality a pre-judgment attachment without the type of safeguards required by Connecticut v. Doehr, ___ U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 66 (1991).

now practically reach into anyone's wallet using a warrant for arrest of article-in-rem, seize the cash and then demand that the owner prove that the money is not the proceeds of a narcotics trafficking. This present application of this rule now codified by the Second Circuit simply does not comport with "substantive due process".

Thus, for example, when Jose Garviria transferred $400,000 to Confecciones Zuny LTDA on July 20, 1990, the United States had no evidence that this particular "res", the $400,000, was connected to narcotics trafficking. Indeed, ten months later when the "public" probable cause hearing was held before the District Court, no evidence was adduced by the United States before the District Court that the "res" was connected to any narcotics trafficking. Nonetheless, the District Court ordered these, and all of the other

Barranquilla Claimants' funds, forfeited.

The same argument can be made for all but two other transfers to the Barranquilla Claimants. These two transfers involving El Banquito Latino and International Exchange and Investments, present facts so tenuous that whether a "substantial connection" or a "nexus" is required, no conclusion that the "res" is connected to any narcotics trafficking can reasonably be made.

Indeed, what in practice is happening, is that by relieving the United States of the burden of proving that a particular "res" has connection to narcotics trafficking, the Second Circuit has approved the seizure of any property without proof of the connection between it and narcotics trafficking thus shifting of the burden of proof on to the claimants in complete disregard of 19 U.S.C. §1615. That

section requires that "probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . ." Consequently, applying that rule to the results of this case necessarily means that the application of 21 U.S.C. § 881 and 18 U.S.C. §981 is "inherently unconstitutional", Caplin & Drysdale v. United States, 491 U.S. 617, 634, 105 L.Ed.2d 528, 547, 109 S.Ct. 2646 (1989), as the United States never showed probable cause for institution of the suit against each wire transfer. As such, these sections must be deemed unconstitutional as violating "substantive" due process.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction and grant this Petition.

Respectfully submitted,

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